STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SCOTT SKRZYCKI,

Defendant-Appellant.

UNPUBLISHED
December 17, 2002

No. 234048
Wayne Circuit Court
LC No. 00-005845-01

Before: Kelly, P.J., and Jansen and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction, following a jury trial, of second-degree murder, MCL 750.317, and his sentence for that crime of thirty-five to seventy years' imprisonment. We affirm.

I. Facts

This case arises from the violent death of Nicole Polk on April 14, 2000, in Ecorse. At approximately 8:30 in the morning on that date, Ricardo Trevino was walking down an alley looking for bottles when he noticed defendant near a dumpster, then spotted a woman nearby, lying face down, with no pants or underwear and her legs spread apart. Trevino went and asked someone to call 911. Officer Stephen Salas responded to the scene and found the body on the west side of the alley behind Loveland's Drug Store. Salas spoke with defendant near the scene, who disclaimed knowing anything about persons or a body in the alley. At this time defendant provided identification, and Salas made note of defendant's nearby address. Later that morning Salas went to defendant's apartment. Salas noticed what appeared to be blood and bleach stains on the floor. After defendant was taken into custody he provided the police with a written statement admitting that he and Polk had been consuming cocaine together in his apartment, and then fought over whether to obtain more drugs.

At trial, defendant testified in his own defense, confirming that he and Polk had been involved in obtaining and consuming crack cocaine, and that an altercation in his apartment ensued. According to defendant, Polk grabbed a screwdriver that happened to be lying about and attacked him with it. In response, defendant lost his temper, struck her with his fist, and thought he had knocked her unconscious. Defendant stated that he carried Polk outside and left her, still breathing, fully clothed, with her back against a wall, between 3:00 a.m. and 4:00 a.m. Defendant explained that he hoped she would wake up and go home. Defendant said he then

returned to his apartment, where he remained until approximately 7:45 a.m., when he went outside to take out his trash, and to see if Polk was where he had left her, saw that Polk was gone, and assumed she had gone home. According to defendant, after running errands he noticed a police line and gathering crowd nearby, but did not consider the possibility that it had to do with Polk until the police informed him that a body had been discovered in the alley. Defendant offered no explanation for how the body happened to be moved or became disrobed.

Defendant was charged with first-degree premeditated murder, but the jury found him guilty of the lesser included offense of second-degree murder.

II. Instruction on Pre-Meditated Murder

Defendant first argues that the trial court erred in instructing the jury on first-degree murder. We disagree. "This Court reviews jury instructions in their entirety to determine if there is error requiring reversal." *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). An instruction should not be given that is without evidentiary support. *People v Johnson*, 171 Mich App 801, 804; 430 NW2d 828 (1988). Where a jury is given a choice between greater and lesser versions of a crime, but the evidence supports only the lesser, the possibility exists that the greater, unsupported, charge will induce the jury to compromise in the direction of a harsher verdict than the one upon which it might otherwise agree. See *People v Graves*, 458 Mich 476, 479; 581 NW2d 229 (1998). Defendant argues that this is what happened in his case. Defendant moved the trial court for a directed verdict of acquittal on the first-degree premeditated murder charge on the ground that evidence of premeditation was lacking, thus preserving this issue for appellate review.

When reviewing the sufficiency of evidence in a criminal case, we view the evidence of record in the light most favorable to the prosecution to determine whether a rational trier of fact could find that each element of the crime was proved beyond a reasonable doubt. *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998). "In order to convict a defendant of first-degree premeditated murder, the prosecution must prove that the defendant intentionally killed the victim and that the killing was premeditated and deliberate." *People v Marsack*, 231 Mich App 364, 370; 586 NW2d 234 (1998). "Premeditation and deliberation require sufficient time to allow the defendant to take a second look." *Id.* at 370-371. "An actor's intent may be inferred from all of the facts and circumstances, and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient." *Fetterley, supra* at 517-518 (citations omitted).

In this case, the medical examiner reported that Polk's body had lacerations and abrasions on the face, and two puncture wounds on the chest, which indicated a struggle. The examiner further concluded that Polk was smothered by hand while conscious and struggling and added that it takes four or five minutes of continuous smothering to cause unconsciousness and death, longer if a struggle causes the smothering to be intermittent. That variety and seriousness of injuries could be taken to indicate that the perpetrator gave the fatal course of action a "second look," when moving between inflicting puncture wounds and a prolonged and strenuous effort to cause asphyxiation. Further, defendant's admitted actions in taking the unconscious victim out of his apartment and leaving her in the alley, with no suggestion that he considered calling for help, could be taken to indicate intention and deliberation in causing death. See *People v*

Plummer, 229 Mich App 293, 300; 581 NW2d 753 (1998) (the defendant's actions after the crime may be considered to establish premeditation).

Further, even if the evidence did not support the instruction on premeditated murder, such error is subject to harmless-error analysis. *Graves, supra* 458 Mich 481-483. "[A] preserved, nonconstitutional error is not a ground for reversal unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999), quoting MCL 769.26. The defendant bears the burden of demonstrating that a preserved, nonconstitutional error resulted in a miscarriage of justice. *Id.* at 493-494. Defendant asserts that his jury's verdict was "obviously" a compromise, but, beyond asserting the insufficiency of the evidence supporting the instruction on the greater offense, does not explain what is obvious about that conclusion. Because defendant fails to demonstrate why the instruction on premeditated murder more likely than not affected the verdict, and to his prejudice, if the instruction was error, it was nonetheless harmless.

III. Photographic Evidence

Defendant argues that the trial court erred in admitting into evidence two photographs of the victim's body as it was found. We disagree. This Court reviews a trial court's decision to admit photographic evidence for an abuse of discretion. *People v Ho*, 231 Mich App 178, 187; 585 NW2d 357 (1998). However, at trial, defense counsel expressly declined to object to any of the prosecutor's photographs. A defendant pressing an unpreserved claim of error must show a plain error that affected substantial rights. The reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

"'Photographs that are merely calculated to arouse the sympathies or prejudices of the jury are properly excluded, particularly if they are not substantially necessary or instructive to show material facts or conditions.'" *People v Mills*, 450 Mich 61, 77; 537 NW2d 909 (1995), quoting 29 Am Jur 2d, Evidence §787, pp 860-861. However, a jury is entitled to learn the "'complete story'" of the matter in issue. *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996), quoting *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978). Accordingly, photographs offered for a proper evidentiary purpose "'are not rendered inadmissible merely because they bring vividly to the jurors the details of a gruesome or shocking accident or crime, even though they may tend to arouse the passion or prejudice of the jurors.'" *People v Eddington*, 387 Mich 551, 562-563; 198 NW2d 297 (1972), quoting 29 Am Jur 2d, Evidence, §787, pp 860-861.

Defendant argues that even if relevant, the photographs in question should have been kept from the jury on the ground that their probative value was substantially outweighed by the risk of unfair prejudice. MRE 403. We have examined the exhibits at issue, and agree that they present strikingly unpleasant imagery. However, as we have indicated above, the prosecutor was properly trying to prove premeditation for the first-degree murder charge. Photographic evidence of injuries is admissible to prove intent to kill. *Mills, supra*, 450 Mich 71. This includes evidence of what was done to the victim's body after death. See *People v Johnson*, 460

Mich 720, 733; 597 NW2d 73 (1999) (evidence that the assailant moved the body to a more secluded area may be indicative of premeditation).

Further, "[t]he mere fact that defendant did not contest the nature of the fatal wounds . . . does not render inadmissible evidence regarding these matters." *People v Schmitz*, 231 Mich App 521, 534; 586 NW2d 766 (1998). Additionally, the availability of alternative means of presenting the information is not grounds for excluding photographic evidence. See *Mills, supra* 450 Mich 76 ("Photographs are not excludable simply because a witness can orally testify about the information contained in the photographs."). Finally, because the evidence illustrated the plain reality of what became of Nicole Polk, we find that the risk of unfair prejudice was slight, and certainly did not substantially outweigh the probative value. MRE 403. For these reasons, we conclude that the trial court did not err in declining sua sponte to exclude the unchallenged photographs.

IV. Ineffective Assistance

Defendant argues that he was convicted without the benefit of the effective assistance of counsel. We disagree. Absent an evidentiary hearing, we will review defendant's claims of ineffective assistance of counsel only for errors apparent on the record. *People v Wilson*, 196 Mich App 604, 612; 493 NW2d 471 (1992). The federal and state constitutions guarantee a criminal defendant the right to the assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. The constitutional right to counsel is a right to effective assistance of counsel. *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Defendant must further show that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996).

Defendant first argues that defense counsel erred in failing to challenge the admissibility of the evidence seized from his apartment. However, defendant fails to specify what evidence this was, or explain how its admission affected the outcome of the case. Thus, we find that this issue is not properly presented for our review because defendant has not properly set forth and argued the merits of his allegation of error. See MCR 7.212(C)(7); *People v Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993). In any event, we find this argument without merit.

Evidence obtained in the course of a violation of a suspect's right to be free from unreasonable searches and seizures is subject to suppression at trial. *People v Cartwright*, 454 Mich 550, 557-558; 563 NW2d 208 (1997), citing US Const, Ams IV and XIV. See also Const 1963, art 1, § 11. In this case, there is an indication in the record from one officer, Officer John Anderson, who interviewed defendant in connection with his police statements, that the Michigan State Police processed the crime scene pursuant to a warrant. However, Officer Salas gave no indication that he asked for, or awaited, any warrant before ringing defendant's doorbell shortly after obtaining the latter's address, and defendant frames this claim of error as a challenge to Salas' entry. A police officer invited into a private residence need not have a warrant to enter. See, e.g., *People v Catania*, 427 Mich 447, 462; 398 NW2d 343 (1986). The

police may seize objects coming within the plain view of an officer who has a right to be in the position to have that view. *People v Jordan*, 187 Mich App 582, 588; 468 NW2d 294 (1991). Defendant nowhere suggests that any evidence that Salas discovered was not in his plain view.

Salas testified that in response to the possible homicide, he and other police officers were "canvassing the neighborhood," meaning knocking on every door and looking in every yard. This canvassing included appearing at defendant's door in hopes of questioning him further about what he knew about the incident. According to Salas, defendant invited him and another office inside. Defendant testified that the police entered his apartment without his permission, explaining, "[b]asically it was like an order." However, defendant did not suggest that he resisted, orally or otherwise. This evidence suggests, at best, a close question whether Salas and his colleague reasonably understood themselves to be invited into defendant's apartment. Had defense counsel challenged the propriety of Salas' entry, the trial court would likely have credited Salas' plain testimony that he was invited in, or at least interpreted defendant's indications, if the court believed them at all, as impliedly permitting the entry.[1] Because the record suggests that defendant chose to allow the police into his apartment, their presence there did not constitute a search for purposes of constitutional analysis. *Catania, supra,* 427 Mich 464-465. Thus, the police were free to act on whatever they saw in plain view. *Id.*; *Jordan, supra*, 187 Mich App 588. Moreover, the evidence does not indicate that Salas himself seized any items, but rather, turned the matter over to the State Police, who apparently operated pursuant to a warrant.

Further, the items taken from defendant's apartment, which included a screwdriver, a wash cloth, and articles of clothing, added but slight weight to the prosecutor's case, which was built mostly on defendant's own accounts of the crime, plus the circumstantial evidence surrounding how the victim was found. Had the evidence taken from defendant's apartment been successfully challenged, a different verdict would not likely have resulted. *Poole, supra,* 218 Mich App 718.

Defendant argues that defense counsel was ineffective for failure to seek suppression of the two statements that defendant gave to the police. Both the federal and state constitutions prohibit the use of coerced confessions at trial. US Const, Am V and XIV; Const 1963 art 1, § 17. "Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waives his Fifth Amendment rights." *People v Howard,* 226 Mich App 528, 538; 575 NW2d 16 (1997). In defendant's first statement to the police, which defendant wrote out in his own hand while in police custody at 10:15 a.m. the day of the incident, defendant admitted buying and apparently consuming cocaine, but made no mention of Nicole Polk. According to the statement, defendant went to bed at 1:00 a.m. and got up at 6:45 a.m. the following morning. At trial, defendant admitted that this account was a lie.

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[1] Such implication is plain on its face in defendant's first statement to the police, which defendant unsuccessfully challenged below, where defendant recounted, "officer rang my doorbell. I went down. Let him in." Although defendant called the statement a lie in general terms, defendant was presumably confessing dishonesty with regard to his benign account of the night before, not his actions when the police approached him.

Defendant argues specifically that his first statement was not given voluntarily because he was in an "advanced" state of cocaine intoxication at the time. "While advanced intoxication from drugs or alcohol may preclude an effective waiver of *Miranda*[2] rights, the fact that a person was narcotized or under the influence of drugs is not dispositive of the issue of voluntariness." *People v Leighty*, 161 Mich App 565, 571; 411 NW2d 778 (1987) (citations omitted). The officer interviewing defendant on this occasion testified that defendant was generally cooperative, filled out a *Miranda* waiver form, and did not appear to be under the influence of any kind of drug. Defendant himself testified that he was "scared to death" at that time, but never suggested that he was significantly intoxicated. These events suggest that it is highly unlikely that a challenge to the voluntariness of that statement, premised on intoxication, would have succeeded below. Counsel is not obliged to argue futile motions. See *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

Defendant further argues that his later statement to the police, where he admitted to a violent altercation with Polk, should have been suppressed, on the ground that the second statement was "the direct fruit" of the first.[3] Setting aside the question of the logical basis for asserting that the second statement was in some way a result of the first, we reject the argument because we find no constitutional infirmity attendant to the first.

Finally, defendant revives his arguments concerning the photographic evidence, raised and rejected above, by characterizing defense counsel's disinclination to object to it as ineffective assistance of counsel. This argument is without merit. For the reasons set forth in the discussion above, the photographs in question were admissible, and so defense counsel would have had nothing to gain by objecting. "Counsel is not obligated to make futile objections." *People v Meadows*, 175 Mich App 355, 362; 437 NW2d 405 (1989). For these reasons, defendant's claims of ineffective assistance of counsel must fail.

V. Sentencing

Finally, defendant challenges both the scoring of two offense variables, and the evidentiary basis for some of the information on which the trial court relied in determining defendant's sentence.[4] Defendant challenges the scoring of offense variables one, concerning aggravated use of a weapon, and two, concerning the lethal potential of a weapon. The trial court stated that defendant had used a screwdriver to inflict multiple wounds on Polk, and accordingly assessed twenty-five and five points, respectively, for these offense variables. At trial, defense counsel suggested that the assessment should be limited to OV 2, but alternatively argued that if there was an assessment under OV 1, then OV 2 should be scored as zero. Defendant now argues on appeal that both offense variables should be scored as zero, on the

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[2] *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[3] See *Wong Sun v United States*, 371 US 471, 485-486; 83 S Ct 407; 9 L Ed 2d 441 (1963) ("evidence unconstitutionally obtained" is the "'fruit' of official illegality," and thus inadmissible).

[4] Because the conduct for which defendant was convicted occurred after January 1, 1999, the legislative sentencing guidelines, enacted pursuant to MCL 769.34, were used to determine the recommended range of defendant's minimum sentence.

ground that defendant's testimony suggested that he handled the screwdriver only defensively, if at all.

MCL 777.31(1)(a) directs a sentencing court to assess twenty-five points for OV 1 if "a victim was cut or stabbed with a knife or other cutting or stabbing weapon." MCL 777.32(1)(d) in turn directs a sentencing court to assess five points for OV 2 if the offender "possessed or used a . . . knife or other cutting or stabbing weapon." In dicta, this Court recently stated that a brass statue did not fall within the statutory definition of a "cutting or stabbing weapon" under MCL 777.31(1) when although it was used to cause the victim to bleed, "it was not because she was cut or stabbed, but because she was hit with a relatively heavy object." *People v Wilson*, 252 Mich App 390, 394-395; 652 NW2d 488 (2002). Unlike in that case, the screwdriver here was used to cause the victim to bleed as it was used in a stabbing manner to puncture the victim's body. We also recognize another recent case states that "a screwdriver, when used as a knife, constitutes a dangerous weapon." *People v Lange*, 251 Mich App 247, 256-257; 650 NW2d 691 (2002).

"This Court will uphold the trial court's scoring of the guidelines if there is evidence to support it." *People v Phillips*, 251 Mich App 100, 108; 649 NW2d 407 (2002). Defendant testified that his violent altercation with Polk involved a screwdriver, albeit admitting to no aggression with it himself. However, the trial court was free to believe that the screwdriver entered the fray while doubting defendant's mitigating representations concerning how he may have handled it. Our review of the applicable law, together with the evidence in this case, especially the puncture wounds on Polk's chest, reveals that the trial court had a proper evidentiary basis for its scoring of both challenged offense variables.

In affirming both challenged offense variables, defendant is left with his original score of fifty-five points, which places him in OV Level II.[5] Because defendant has not challenged his PRV Level, he remains in Class D with a score of thirty-five points. Thus, as a second habitual offender, the appropriate range for defendant's minimum sentence under the guidelines was eighteen years' and nine months' to thirty-nine years' imprisonment. Because the minimum sentence falls within the guidelines range, we find the trial court properly sentenced defendant to a minimum term of thirty-five years' imprisonment.

Lastly, defendant challenges the evidentiary basis for some of the information on which the court relied in determining his sentence, however, he argues this couched in terms of an improper upward departure claim. Because of our resolution of the scoring issue, defendant's claim that the trial court incorrectly departed upward and sentenced defendant improperly are without merit. We would like to note, however, that our review of the record reveals that the trial court's factual conclusions, to the extent relevant to sentencing, were reasonable inferences

[5] We note that defendant's sentencing information report (SIR) does not reflect the scores discussed at sentencing before the trial court and further does not reflect defendant's status as a habitual offender. We are at a loss for information regarding the origin of these ministerial errors. However, our review of the sentencing transcript together with admissions made at argument and in defendant's brief on appeal support our conclusions that defendant was correctly sentenced as a second habitual offender and also that his offense variable total was properly scored.

from the evidence. Defendant argues that there was no evidence to implicate him as the person who dragged and disrobed Polk's body. However, defendant admitted that he had struck Polk, observed that she was unconscious, and then took her down to the alley and left her there. Forensic evidence that the body had been dragged suggested that it was moved from where defendant admitted originally placing it. Trevino testified that he noticed defendant nearby when he found the body in the morning. This evidence, considered along with the lack of any evidence that anyone else disturbed Polk, provides a reasonable evidentiary basis for the trial court's conclusions in this regard. Although defendant insists that this indicates that some third party moved, and otherwise disturbed, the body, the evidence comports at least as well with the theory that defendant himself was responsible for those actions. The trial court could logically infer that it was defendant who moved the body farther from his own residence, and arranged it to appear as if a sexual assault had taken place, in order to mask his responsibility for Polk's death. See *People v Johnson*, 137 Mich App 295, 303; 357 NW2d 675 (1984) (it is sufficient if the prosecutor proves its own theory in the face of whatever contradictory evidence the defense may produce; the prosecutor need not disprove every reasonable theory of innocence). For these reasons, we do not take issue with the trial court's factual finding in this regard. Further, we regard the combination of defendant's admissions, and the circumstances under which the victim was found, as verifying the trial court's inference that it was defendant who left the body as the police found it.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Kathleen Jansen
/s/ Pat M. Donofrio